REPLY TO QUESTION INVOLVED

The opposition brief incorrectly presents the question as being whether market value of the improvements is to be determined "without regard to the remaining term" of the lease. Petitioner contended and the District Court ruled that both the possibility of renewal and of non-renewal should be considered. [1]

REPLY TO STATEMENT

The government (Brief pp. 2-3) States:

> "The pertinent facts are undisputed and are set forth fully in the court of appeals' opinion. The government sought to obtain all rights to the property in issue. Prior to bringing this suit it settled with the fee owner . . ."

As to any such settlement prior to the action and as to any inference that the government had so acquired the fee, the quotation is positively untrue and grossly misleading. While the Circuit Court opinion

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[1] That the Court ruled on pre-trial and petitioner urged that in determining market value consideration should be given to "all the elements and possibilities whatsoever found to then affect the market value of those interests including but not exclusive of the possibilities of renewal of the lease and the landlord requiring the removal of the improvements in the event of there being no lease renewal."

does so state, it is likewise not supported by the record. That mistake may well be the real reason for the erroneous decision of the Court.

The pre-trial order of the District Court states as a part of the admitted facts

> "5. The parcel of land designated as Parcel "A" consists of 0.75 of an acre located at Almota, in Whitman County, Washington. The fee title to said lands immediately prior to the filing of the Declaration of Taking was in the Oregon-Washington Railroad & Navigation Company . . . ."

This is not a case of the government already owning the fee and having a legal right to refuse to renew the lease. Instead the fee was then owned by the Oregon-Washington Railroad & Navigation Company which had by its conduct and actions given good reason to believe that the lease would be renewed at the end of the term (Pet. App. B. 56). Though the tenant had no legal right to a renewal, neither did the government have a legal right to deny a renewal. It was, therefore, found by the District Court to be proper in the valuation of the buildings and improvements (the ownership of which did not terminate with the end of the term) to consider the probabilities of both the renewal and nonrenewal of the lease as they affected the market value.

REPLY TO ARGUMENT

The case of the United States v. Petty Motor Co., 327 U.S. 372, is heavily relied upon by the government and is cited as having "rejected the market value theory". On the contrary the opinion affirms the fixing of just compensation on the basis of market value as follows:

> "[5-7] The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so called "market value."

Neither does the case hold that the valuation of tenant owned building improvements must "be determined solely on the basis of the remaining lease term". No tenant owned buildings were there involved. They were all owned by the landlord.

The parties stipulated that the tenant was the legal owner of the buildings. Also, considering all elements of value and that they might or might not have to be removed at the end of the term the agreed market value was $274,625.00. (Pet. App. B. 59).

That award is not contrary to the Petty Case as the market value so agreed upon includes only the value of legal rights

actually owned consisting of a term of years in the land and an ownership of buildings not limited to the lease term. The value of nothing else was included.

In commenting upon the Borough of Manhattan Second Circuit case, 388 F. 2d 596, the government asserts that the decision merely refers to a determination of appropriate salvage value. Reference to a subsequent decision of the same Court makes clear that no such valuation is intended and that the rule adopted is in fact in direct conflict with the Circuit Court decision in this case as the Second Circuit has adopted an "in place" value not a salvage value.

> "It is well settled in this circuit that a tenant who has installed fixtures in property condemned by the United States need not content himself with their salvage value when the government has made their continued use in place impossible. . . . . because these fixtures diminish in value upon removal, a measure of damages less than their fair market value for use in place would constitute a substantial taking without just compensation." United States v. 1,132.50 acres of land, Etc. Allegheny Sand & Gravel, 411 F. 2d 356.

In essence the government's argument is confined to the merits of the Circuit Court decision. Nothing is presented contrary to petitioner's contentions that that decision

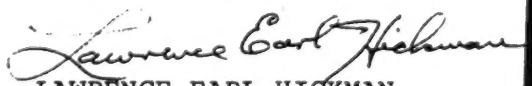
is in direct conflict with the decisions of the Second Circuit and in apparent conflict with those of the Supreme Court, other Circuit Courts, and of the Ninth Circuit itself. Nor is it denied that the question involved is a constitutional question of national importance.

The petition and the brief in opposition, though duly considered, do not constitute a hearing upon the merits. The immediate issue is whether this case should be so heard.

CONCLUSION

The uniformity of constitutional law and the protection of constitutional rights necessitate the granting of the petition and the hearing of this matter upon the merits.

Respectfully submitted,



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